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No. 88-84

IN THE

Supreme Court of the United States

October Term, 1988

MAURICE JOHN,

Petitioner,

vs.

CITY OF SALAMANCA and NORRIS STONE,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Opinions Below

The decision of the Court of Appeals is reported at 845 F 2d 37 (Second Cir. 1988). The opinion of the District Court is unreported and is set forth in the appendix to the Petition for Certiorari at pages 13a through 19a.

Jurisdiction

The judgment of the Court of Appeals was entered on April 19, 1988 and the Petition for Certiorari was filed within 90 days of that date. The jurisdiction of this court is invoked under 28 USC §1254 (1).

Statutory Provisions Involved in this Case

The statutory provisions involved in this case are: (1) Act of February 19, 1875, 18 Stat. 330; (2) 25 USC §233 (64) Stat. 845. They are reprinted in the appendix of the Petition of Certiorari at 21a through 24a and 27a through 29a respectively.

Counter Statement of the Case

The petitioner is a Native American and a member of the Seneca Nation of Indians who owns property located within the boundary* of the respondent city on the Indian Reservation. He wished to remodel an existing restaurant business there and began to renovate the property, both inside and outside, but did not obtain a city permit for the renovation project. Other individual Indians in the past had obtained such permits and indeed the Seneca Nation itself had, on occasion, paid the $5.00 fee and obtained a permit for the building of structures on reservation land located within the city. When the respondent Norris Stone, the accessor and zoning code enforcement officer of the city responsible for the enforcement of building codes caused a notice of building code violation to be served upon the petitioner for failure to obtain a building permit, petitioner filed a complaint and obtained an Order of the United States District Court for the Western District of New York requiring the respondents to show cause why an Order restraining the enforcement of the building code and the notice of violation should not be made. The defendants' moved for summary judgment supported by affidavits of Norris Stone and present and former executive officers of the city and members of the City Council. The District Court, relying on an act of Congress of 1950 (25 USC §233) held that the State civil law applied to reservation land in the City and dismissed the suit. The Second Circuit affirmed on different grounds and relied instead on an earlier Act of Congress passed in 1875. The Circuit Court

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* The suggestion that the city of Salamanca is growing like Topsy, which is made in footnote 12 at page 16 of the Petition, is an error. The City of Salamanca has the same boundaries as originally set forth in the surveys of the Villages of Salamanca and West Salamanca under the 1875 statute. The boundaries of the city are not changing or expanding.

held that the laws sought to be enforced were municipal laws of the City of Salamanca and that when Congress specifically provided that "all municipal laws and regulations of said State may extend over and be in force within said villages" (845 F. 2d at 40) it meant that the City of Salamanca building code provisions are applicable to land in Salamanca leased to Indians. The Second Circuit held that the 1875 Act as interpreted by the Court in *United States v. Forness*, 125 F 2d 928 (1942) decided some 46 years before made the building code adopted and enforced by the City of Salamanca applicable to the petitioner (845 F 2d at 40). This Court denied certiorari in the *Forness* case under the name of *City of Salamanca v. United States*, 316 U.S. 694 (1942).

The petitioner now seeks review in this Court.

REASONS FOR DENYING THE WRIT

(a) The decision of the Circuit Court is in accord with the decided cases and correct in all respects. It contains nothing which contradicts settled law.

This Court should deny the Petition for Certiorari. The opinion of the Second Circuit affirming the judgment below contains nothing which departs from settled law. The Court relied on its opinion in *United States v. Forness*, 125 F2d 928 (2nd Cir., 1942). That case also held that in enacting the 1875 legislation, Congress provided that municipal laws are in effect on the reservation within the City of Salamanca. This 1942 holding of the Second Circuit was through a most distinguished panel, including Circuit Judges Augustus Hand, Charles Clark and Jerome Frank. The *Forness* case has been cited with approval by this Court on numerous occasions, and this Court denied certiorari in that case (316 US 694 (1942)).

Moreover, the case was correctly decided below. Both in *Forness* and in this case, it was held that the words "all municipal laws and regulations" to "be in force within said villages" makes Salamanca municipal law applicable to all inhabitants, both Indian and non-Indian.

The affidavits presented on the motion established that the Indians, with the exception of petitioner, have complied with the municipal building code, and have paid the nominal fee of $5.00 to obtain the required building permit. The law has been settled for over 45 years that this is so, and nothing in the Second Circuit opinion should come as any surprise.

The petitioner claims that he is confused. He should not be. A careful reading of the Second Circuit opinion reveals that the Court did not affirm the judgment relying on 25 USC §233, but relied instead on the 1875

statute. When the Court stated, "We do not adopt Judge Curtin's reasoning, but nevertheless, agree with the result he reached", the Court dispels confusion. The opinion of the District Court relying on §233 is without effect under the current Court's holding. The claim made by the petitioner that "thorough confusion" results, and that "The District Court's ruling thus remains in full force" (Petition, page 13) is pure hyperbole, and not worthy of serious consideration. The sky is not falling—business goes on as usual in the City of Salamanca, with the Indians conforming to the municipal law. All that is changed is that Maurice John must pay the $5.00 fee for a building permit just like everyone else. This is as it should be, and is in accord with common sense.

A building code and a zoning law that is not applicable to all in the city is self defeating.

The case was correctly decided; it raises no earth-shattering issue; the law remains as it was for the past 118 years; the precedent established 46 years ago has been followed, and all citizens within the City of Salamanca have been treated equally.

(b) The enactment of 25 USC §233 did not supersede the 1875 Act.

The petitioner makes the novel and new* argument that the 1950 enactment of 25 USC §233 superseded the 1875 legislation. He cites in support of this remarkable thesis the case of *Montana v. Blackfeet Tribe,* 471 US 759 (1985), a tax case recently decided by this Court. There, this court reaffirmed its traditional view that attempts to tax Indian Land by the State are extraordinary and will be allowed only if the Congressional authorization is "unmistakably clear" (471 US at 465). The 1875 and 1950 actions by Congress both prohibit taxing of Indian Land and there is no claim here that the five dollar fee required for the building permit is a tax.

The fact that both statutes contain provisos that, regardless of the application of local law, no law permitting taxing of Indians shall have any effect implies that some local law applies to Indians. As stated by the Second Circuit "Section 8 expressly exempts the persons and property of the Indians from taxation, 18 Stat. at 331, suggesting that Congress recognized the possibility that the laws of the villages would apply to Indians as well" (845 F 2d at 42).

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* Not made in either the District Court or the Circuit Court.

(c) The decision reflects the custom and practice which has existed in the City of Salamanca for 113 years of the Indians complying with local law.

The Seneca Nation of Indians has complied with the local law including municipal and State law for two centuries and the decision which is sought to be reviewed only confirms that fact. Originally the leases were thought to be authorized by state law until this Court decided otherwise, *The New York Indians*, 5 Wall 761 (1867). Because the leases needed federal approval the 1875 Act was passed which required that the boundaries of the villages of Salamanca and West Salamanca be surveyed and that municipal laws be in force within said villages (Section 8).

The affidavits submitted in support of the respondents summary judgment motion in the District Court detail that the indians and indeed the Seneca Nation subject themselves to local civil law in the City of Salamanca. The Seneca Nation as well as individual Indians have applied for and received the building permit which is the subject of the current contretemps with the petitioner. Indians within the city obey the local traffic and parking laws. Local licensing laws including those regarding licensed plumbers are complied with by Indian plumbers. City civil law except laws regarding hunting and fishing permits are applied equally to Indians and non-indians in the city. Indians living in the city who own dogs obtain dog licenses and when desiring to marry, obtain the required marriage license.

The fact of the application of the laws of the State of New York and of the City of Salamanca, New York to Indians within the City of Salamanca and to Indians on the reservations located in the State of New York can be told from the point of view of what has actually occurred

since 1789. The historic development of the application of the laws of the State of New York to Indians located upon Indian reservations can be tracked through the years as follows:

A) "By chapter 183 of 1900 provision was made for compulsory education of Indian children on the Allegany and Cattaraugus reservations, and by chapter 188 of 1901 like provision was made for the Onondaga reservation. By chapter 424 of 1904 provision was made for the compulsory education of Indian children on all reservations within the State. It seems to have been carried into effect without any notable opposition, and its benefits are mentioned in the report of a committee that investigated conditions upon the reservations in 1905 (Assembly Document No. 40 of 1906, pages 296-297)." (Opinions of the Attorney General, 1925 at page 212.)

B) "By the Treaty of Fort Harmar, in 1789, confirming peace between the United States and the Six Nations (VII Stat. 33, II Kappler 23, Indian Problem 87) it was provided that Indians guilty of robbery, murder or horse stealing, committed against citizens or subjects of the United States, should be delivered up to the nearest military post if the crime was committed within the territory of the United States, or to the civil authority of the State within which it should have happened." (Opinions of the Attorney General, 1928 at page 121.)

C) "... In extending our system of laws over these people (Indians) for their own protection, as well as for the protection of the people and citizens generally, no attempt has ever been made to interfere with their social or domestic relations, nor to regulate the manner of acquiring, holding or conveying property among themselves. But in their intercourse and dealings with

other people, they, as individuals, are subject to the civil and criminal laws of the State, . . ." *Crouse vs. N.Y. Penn. and Ohio R.R. Co.,* reported in 49 Hun, 576, cited by the Attorney General in rendering an opinion in favor of the right of levy on an Indian reservation. (Opinions of the Attorney General, 1932 at page 383.)

D) "In the absence of Federal regulation the State, through its Conservation Department, has the authority to enforce its police regulations with regard to fire control as embodied in sections 50, 51 and 63 of the Conservation Law, as well as the department forest fire regulation, No. 2, effective February 5, 1925." (Opinions of the Attorney General, 1934 at page 285.)

E) "The police power of the State extends to Indians living on reservations in this State and the State courts have criminal jurisdiction except with respect to the crimes enumerated in 18 USC §548." (Opinions of the Attorney General, 1937 at page 113.)

F) "The State, in the exercise of its police power, has the authority to enforce compliance with the provisions of the State Vehicle and Traffic Law with regard to operators' licenses and motor vehicle registration and the provisions of the State Tax Law relating to licenses for filling station operators and payment of motor fuel tax, against tribal Indians residing upon the Indian reservations of the State. The provisions with reference to the licensing and registration of motor vehicles is not applicable to their use upon the reservations off the public highways." (Opinions of the Attorney General, 1939 at page 189.)

G) "State peace officers have as complete authority to enforce the provisions of the State Vehicle and Traffic Law between Indians and between Indians and white

persons on tribal reservations as they have elsewhere in the state after excluding, however, the criminal offenses comprehended in the federal statute, commonly known as the Seven Crimes Act (Title 18, Sec. 548 (Crim. Code Sec.) USCA.)" (Opinions of the Attorney General, 1942 at page 211.)

H) "County commissioner of health who has succeeded to duties of town health officers takes their duties upon the reservations for the enforcement of the general provisions of the State Sanitary Code." (Opinions of the Attorney General, 1943 at page 287.)

I) "State Troopers have power and duty to maintain law and order upon the reservations, and particularly upon the Tonawanda Reservation." (Opinions of the Attorney General, 1944 at page 325.)

J) "The dog licensing law is applicable to the Tuscarora reservation and the Lake Ontario Ordinance Works, but is not applicable to Fort Niagara." (Opinions of the Attorney General, 1945 at page 103.)

The State's regulation of Indians on Indian Reservation evolved because of expediency and this condition of necessity was recognized by the United States Supreme Court in *People vs. Dibble,* 21 How. 366 at 370 (1859) when it was said:

> "Notwithstanding the peculiar relation which these Indian nations hold to the Government of the United States, the state of New York had the power of a sovereign over their persons and property, so far as it was necessary to preserve the peace of the Commonwealth, and protect these feeble and helpless bands from imposition and intrusion. The power of a state to make such regulations to preserve the peace of the community is absolute, and has never been surrendered."

The laws and regulations relating to vehicle and traffic, housing, zoning, building permits, etc. have always been enforced by the City and State as against Indians and non-indians alike.

The authority to so regulate the conduct of Indians within the City as well as on the Indian reservation has been derived from statutes such as New York Indian Law §71, the Act of 1875, 25 USC §232 and §233 as well as from the more subtle authority of expediency which has been countenanced by the United States Supreme Court on the predicate of "Judicial recognitions of the State's jurisdiction to legislate and adjudicate for all persons within its borders, including law and order on the reservations, except where Congress has provided. . . ." (See Opinions of the Attorney General, 1950 at page 207.) Because Congress has not acted, it does not follow that there is no law upon a reservation, *Mulkins vs. Snow,* 232 N.Y. 47 (1921).

The conclusions to be drawn from what has occurred is that the State, in the exercise of its own sovereignty and police power, can enforce its provisions against Indians except in the instances (prior to 25 USC §233) where it would invade treaty rights, interfere with Indian commerce, or interfere with the National right of protectorate.

The custom and practice in the City of Salamanca is to comply with the provision of the 1875 Act. This court should not sow doubt as to the correctness of these practices by granting certiorari.

Conclusion

The Petition for a Writ of Certiorari should be denied.*

Respectfully submitted,

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* As an alternative we believe that the District Court was correct in interpreting the legislative history of 25 USC §233 as evidencing the intent of Congress that the Indians are fully subject to State civil law. The legislative history of the act states "This bill provides that the Indians in the State of New York shall be subject to the civil laws of the State with the following exceptions: "(1950 United States Code Congressional and Administrative News pg. 3731; See also footnote 6 of this Court's opinion in *Williams v. Lee*, 358 US 217 at 221 (1959) using 25 USC §233 as an example of a Congressional grant of broad civil jurisdiction to the State). If that is so this Court should grant the petition and affirm the judgment in the District Court based on the opinion of the District Court.